STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

WILLIAM LARON JOHNSON,
Defendant-Appellant.
_____/

Supreme Court No. 127525

Court of Appeals No. 248480

37th Circuit Court No. 02-4605 FH

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127525

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES
(Continued)

COUNTER-STATEMENT OF APPELLATE JURISDICTION AND GROUNDS FOR APPEAL

Defendant applies for leave to appeal from the October 28, 2004 opinion of the Michigan Court of Appeals affirming his conviction. (See Appendix A). MCR 7.301(A)(2). On July 15, 2005, this Court issued an order, directing the Clerk to schedule oral arguments to consider what action to take in response to Defendant's application, pursuant to MCR 7.302(G)(1). Plaintiff-Appellee submits that Defendant-Appellant has not set forth sufficient grounds in his application, pursuant to MCR 7.302(B), and that the instant application should be denied.

COUNTER-STATEMENT OF QUESTIONS

I. WHETHER THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THE PROSECUTOR COULD SEEK TO IMPEACH DEFENDANT WITH HIS PRIOR THEFT CONVICTIONS, THOUGH HE DID NOT, PURSUANT TO MRE 609?

The Court of Appeals answered, "Yes."

The trial court answered, "Yes."

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

II. WHETHER RESENTENCING IS NOT REQUIRED SINCE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SCORING OFFENSE VARIABLES 10 AND 11?

The Court of Appeals answered, "Yes."

The trial court answered, "Yes."

Plaintiff-Appellee answers, "Yes."

Defendant-Appellant answers, "No."

COUNTER-STATEMENT OF FACTS

Lanquinsha Durham (DOB 12/14/85) was seventeen years old at the time of trial. She knew the Defendant through her cousins, but she and the Defendant were not related. (TI 72). Ms. Durham met the Defendant when she was fifteen, in 2001, and considered him a friend, though they did not have a boyfriend-girlfriend relationship. (TI 73, 79). Ms. Durham did not want to testify, but was subpoenaed to testify. (TI 85).

Defendant had sexual contact with Ms. Durham in November, 2001, about three months after they met. (TI 74-75, 79). After talking and playing cards, Ms. Durham and the Defendant had sexual intercourse in his bedroom. (TI 76). They did not use any form of birth control. (TI 77). Ms. Durham did not recall talking with the Defendant about having sex before they did. (TI 78). Afterwards, Ms. Durham went home, alone. (TI 78).

Defendant had sex with Ms. Durham a second time the same month, before she turned sixteen. (TI 79, 85). Ms. Durham's cousins were at Defendant's house with Ms. Durham on both occasions. (TI 80). The second time also took place in the Defendant's bedroom. (TI 81). They watched television, ate, and then had sexual intercourse. (TI 82).

Ms. Durham recalled the Defendant also coming over to her residence where they had sex, though she stated she was sixteen years old at this time. (TI 84, 96). Ms. Durham gave birth to a child on August 8, 2002. (TI 83). Ms. Durham told the authorities[1] that the Defendant was the father of this child, but later learned he was not; and Ms. Durham did not divulge having sex with anyone else. (TI 83, 93, 98-99). Ms. Durham thought the Defendant was the father of her child and did not think it could be another man because she only had sex with the other man once. (TI 101-102). Ms. Durham told Detective Wise that she was fifteen when she had sex

[1] Child Protective Services filed a report in this matter. (TI 114).

with the Defendant. (TI 115). The parties stipulated to admission of the DNA report which excluded the Defendant as being the father of Ms. Durham's son. (TI 117).

Detective Brad Wise spoke with the Defendant, who agreed to talk to him in September, 2002. (TI 106, 113). Detective Wise asked the Defendant if he thought he was the father of Ms. Durham's baby. Defendant responded that he was not sure, but he planned on having a paternity test to determine whether he was. (TI 106). Defendant told Det. Wise he met Ms. Durham through mutual friends of the family. Defendant also told the detective that he had sexual intercourse with Ms. Durham twice; the first time Defendant thought alcohol was involved. Defendant denied knowing Ms. Durham's age when they had intercourse and further told the detective that when he learned she might be fifteen, he stopped having sex with her. (TI 107-108). Defendant told the detective there was no force or coercion, and that the sex was consensual. (TI 109).

Defendant wrote to Ms. Durham in October, 2002, signing the letter with "much love"; and in the letter, Defendant told Ms. Durham not to go to court, but if she did, not to say anything. Defendant wrote that, if she said anything, he wanted Ms. Durham to state that she lied to him about her age. Defendant also wrote that all that was needed to convict him was for Ms. Durham to testify that they did have sex two times while he knew she was fifteen years old. Defendant also asked in the letter why Ms. Durham did not send more pictures of the baby and that he thought the baby looked more like her than him. (TI 89; PX 1; TI 111-112).

Defendant's direct examination began with a recital of his convictions for breaking and entering in 1999 and receiving and concealing stolen property in 2000. (TI 123). Defendant testified he had sex with Ms. Durham, but not until after December 24, 2001, when he was taken off his tether. (TI 125). Defendant explained a tether is a device on the ankle that alerts

authorities when one leaves the house. (TI 125). Defendant acknowledged the first time he had intercourse with Ms. Durham they were at his house. The second time, he testified, was at her house. (TI 126). Defendant agreed that he could have intercourse in his house while on tether. (TI 139). Defendant denied having a sexual relationship with Ms. Durham in November, 2001. (TI 127). Defendant stated he ended the sexual relationship in March when Ms. Durham's mother told Defendant she was only sixteen years old. (TI 128). Defendant testified he thought sixteen was considered underage. (TI 128).

When the Defendant learned Ms. Durham was pregnant, he stated he thought just "a little bit" that he might be the father. (TI 129). On cross examination, the Defendant first denied ever thinking he could be the father of the baby, and after being questioned about the letter[2] he said again that he may have thought a "little bit" that he could be. (TI 139). Defendant acknowledged the letter he sent to Ms. Durham and said he sent her additional letters. (TI 129). Defendant denied telling Detective Wise he learned Ms. Durham was only fifteen years old, and that he learned she was sixteen. (TI 131). He also denied telling Detective Wise when they had sex. (TI 140). Defendant denied requesting Ms. Durham to lie if she testified and stated that he just did not want her to come to court. (TI 133, 142). He also did not remember writing in the letter to Ms. Durham, "But I do want you to tell them that you told me that you was older than 15, kay?" (TI 142).

Defendant was convicted by jury of two counts of third-degree criminal sexual conduct. MCL 750.520d(1)(a) (person between 13 and 15 years old) (Judgment of Sentence, April 11, 2003). The Michigan Court of Appeals issued a per curiam opinion affirming these convictions.

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[2] In the letter Defendant wrote about the baby looking more like Ms. Durham than himself, he also wrote denying that he told his own mother that the baby was not his. (TI 140).

(Docket No. 248480). Additional facts will be set forth as they relate to the case at bar.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING THE PROSECUTOR COULD SEEK TO IMPEACH DEFENDANT WITH HIS PRIOR THEFT CONVICTIONS, THOUGH HE DID NOT, PURSUANT TO MRE 609.

Standard of Review:

The People agree with Defendant's statement of the standard of review for this issue. See People v Allen, 429 Mich 558, 596; 420 NW2d 499 (1988). However, the People also believe this issue is at least partially unpreserved for review, as discussed below.

Discussion:

Before testimony was taken, the prosecutor requested the court determine whether or not the Defendant's prior theft convictions could be used for impeachment, should he testify. (TI 55). The prosecutor argued the probative value was high, while the potential for prejudice was extremely low, in light of the dissimilar nature of the prior crimes and charged criminal sexual conduct counts in addition to the instruction the court would provide the jury. (TI 56). In response, defense counsel placed a "general objection. . . and let the Court use its discretion as to whether or not it feels that the probative value outweighs that of the prejudicial value. . . ." (TI 57). MRE 609 states, in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted **unless the evidence has been elicited from the witness** or established by public record during cross-examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

> (B) the court determines that the evidence has significant probative value on the issue of credibility, and if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its probative effect.

MRE 609(a) (emphasis added).

Defendant argues the trial court abused its discretion by ruling the prosecutor could utilize MRE 609 to impeach Defendant on cross examination. While Plaintiff acknowledges that it has been determined that a defendant does not waive his right to appellate review by introducing the prior convictions during direct examination, as discussed in People v Lester, 172 Mich App 769; 432 NW2d 433 (1988), *lv den* 453 Mich 944; 557 NW2d 308 (1996), in this case, the prosecutor did not actually impeach Defendant on cross examination with his prior crimes. And as Defendant notes, a defendant must testify and be impeached with his prior convictions, in order to preserve the issue for appeal. The case against Defendant was strong, and the prosecutor was able to confront Defendant's direct testimony with the letter he wrote to Ms. Durham; therefore, this case presented a situation as discussed in *Finley* where "the case against the defendant is strong, or other avenues of impeachment are available, it is possible that the defendant's prior record would not have been used." People v Finley, 431 Mich 506, 513; 431 NW2d 19 (1988) (citation omitted).

Therefore, the People question whether this issue is actually preserved for appeal, and if so, to what extent. It is clear that a portion of the Defendant's current argument is not preserved, that being whether the trial court abused is discretion in ruling on whether the prior convictions would be considered more probative than prejudicial, since trial counsel "[l]et the Court use its discretion as to whether or not it feels that the probative value outweighs that of the prejudicial value. . . ." (TI 57). Claims of error must be preserved in the record for appellate review. People v Carines, 460 Mich 750, 762-765; 597 NW2d 130 (1999), *reh'g den* 461 Mich 1205;

602 NW2d 576 (1999). Counsel may not harbor error as an "appellate parachute." People v Pollick, 448 Mich 376, 387; 531 NW2d 159 (1995) (citation omitted). Defendant waived this issue for review when trial counsel informed the trial court that it would leave the decision to the court's discretion. See Carines, *supra* at 762 fn. 7 (definition of waiver).

Defendant also argues the trial court failed to adequately express the age of the prior convictions on the record, or the probative value of the prior convictions, other than generally, as the Defendant alleges was done, or the impact on the defense. First, the prosecutor discussed the ages of the convictions (1999 and 2000), and so certainly the court was advised of the ages of the convictions. Secondly, the court did include in its ruling its analysis on the probative value versus the prejudicial impact to the defense and the nature of the offense. The trial court actually stated in its ruling the following:

> [T]he first two offenses contain an element of theft that have been referenced by the Prosecution. . . and their punishment. . . fits 2A. The determination for me is whether the probative value outweighs any prejudicial impact. And, first of all, the question is what is probative on the issue of credibility. . .it seems to me it does have a probative value. Given the nature of this offense, compared to what's being sought to be used for impeachment purposes, I don't believe that the prejudicial impact outweighs the probative value. And so should the Defendant testify, the Prosecution will be in position to be able to impeach him and I'll give the appropriate instruction . . .

(TI 57). The trial court adequately articulated its reasoning in compliance with MRE 609. Plaintiff does agree that the trial court did not explicitly state that the convictions at issue occurred in 1999 and 2000 in its ruling, however, this should not amount to an abuse of discretion since it is apparent the trial court was aware of the offense ages. See People v Daniels, 192 Mich App 658; 482 NW2d 176 (1991), *amended and lv den* 440 Mich 880, 882; 487 NW2d 464 (1992) (trial court did not articulate reasoning or otherwise comply with rule, but harmless error); People v Bartlett, 197 Mich App 15; 494 NW2d 776 (1992) (if admission of prior

conviction was error, it was harmless in light of overwhelming evidence of guilt).

Furthermore, Plaintiff disagrees with Defendant's assessment of the strength of the case against Defendant. The defense emphasizes that Ms. Durham lied to the police about who the father of her baby was. The trial prosecutor stipulated to the fact that the Defendant was not actually the biological father of Ms. Durham's baby. Ms. Durham testified that at first, she reasonably believed Defendant to be the father of her child, in light of their November relations and the August birth of her child, and that she did not believe another man could be the father since she only had sexual relations with the other person once. In any case, the parentage of Ms. Durham's child was not at issue, nor does it negate Defendant's culpability.

Defendant also argues that it is likely that he was the only person who could testify to the dates of sexual intercourse. However, Ms. Durham testified that other people were present, albeit not in the same room, in the Defendant's house when they were together. However, the strength of the prosecution's case rested in Ms. Durham herself, who admittedly did not want to testify, and the letter written by the Defendant to Ms. Durham, telling her what to say and not to say in court.

The Defendant concludes by arguing that he was prejudiced by admission of his prior convictions, even though the trial court instructed the jury on the restricted use of this evidence. This argument is of no merit since juries are presumed to follow their instructions, and the instructions are in turn presumed to cure most errors. See e.g., People v Abraham, 256 Mich App 265, 278-279; 662 NW2d 836 (2003).

The trial court did not abuse its discretion by ruling the prosecutor could impeach the Defendant with his prior convictions, though the prosecutor ultimately chose not to do so. Further, the trial court sufficiently complied with the requirements of MRE 609. Defendant's

request for relief should be denied.

II. RESENTENCING IS NOT REQUIRED SINCE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SCORING OFFENSE VARIABLES 10 AND 11.

Standard of Review:

The interpretation and application of the sentencing guidelines presents a legal question which this Court reviews *de novo* on appeal. People v Morson, 471 Mich 248, 255; 685 NW2d 203 (2004) (citing People v Perkins, 468 Mich 448, 452; 662 NW2d 727 (2003)). The sentencing court has discretion to determine the points to be scored for an offense variable, provided there is record evidence that supports the score. People v Leversee, 243 Mich App 337, 349; 622 NW2d 325 (2000), *lv den* 464 Mich 858; 630 NW2d 334 (2001).

Discussion:

This issue presents a question of whether the trial court correctly scored and applied the sentencing guidelines. The Court construes a statute to "give effect to the intent of the Legislature. Morson, 471 Mich at 255. In doing so, the Court first looks to the language of the statute. People v Phillips, 469 Mich 390, 395; 666 NW2d 657 (2003). If the language is unambiguous, the statute is followed as written, giving the words of the statute their plain meanings without going beyond the statutory language to determine legislative intent. Phillips, *supra* at 395; People v Houston, ___ Mich ___ (No. 126025; July 26, 2005).

In the instant case, the Defendant was sentenced as a habitual offender, fourth offense. (ST 3). Defense counsel objected to the scoring of Offense Variables 10 and 11 ("OV 10, OV 11"). MCL 777.40; MCL 777.41. The trial court overruled counsel's objections, after ensuring that Defendant was properly scored. (ST 7). The trial court, in sentencing the Defendant to a term of 100 to 480 months with the Michigan Department of Corrections, stated:

> You're 21 years old, and you have a horrible, horrible record to this point as an adult, let alone as a juvenile. And - this offense which you committed while you were on

parole is going to run consecutive to any term of imprisonment you're presently serving as it is. As I said, I mean, **you just have a horrible, horrible record. And that's what's driving, to a great extent, though not exclusively, but to a great extent, the range in terms of the sentencing range to be where it is in this matter**. Although I might add, and it seems to me that I've said this so many times, the Legislature did - the law is what it is - whether it's a 15-year-old, or a 10-year-old, they're not able to give consent. And - quite frankly, I don't disagree with that presumption. A 10-year-old or a 15-year-old does not have the maturity level of a 21-year-old, even. And shouldn't be placed in some of these positions that you have placed them in, and went along with as well.

(ST 12-13) (emphasis added). In light of the trial court's comments, if it was error to attribute points to Offense Variable 10 or 11, this Court should also find that any error was harmless. See People v Mutchie, 468 Mich 50, 52; 658 NW2d 154 (2003) (trial court clearly expressed intention to sentence the defendant at the stated range).

Offense Variable 10 - Exploitation of a Vulnerable Victim

Defendant was scored ten points for the exploitation of a vulnerable victim (OV 10). A score of ten point under OV 10 is appropriate when the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). Defendant argued that Ms. Durham was close to the age of consent and that the sexual acts were consensual. However, the Legislature has plainly stated that someone fifteen years old cannot give consent, and that sexual penetration of a young person is criminal, regardless of the youth's purported consent. MCL 750.520d(1)(a) (person between 13-15).

The trial court could reasonably find, based on the record evidence, that ten points was appropriate in this case. Defendant was five years older than Ms. Durham. Although certainly, greater gaps in age[3] more dramatically display victim exploitation based on age, a five-year age

[3] People v Phillips, 251 Mich App 100; 649 NW2d 407 (2002), *aff'd* 469 Mich 390; 666 NW2d 657 (2003) (where older prospective adoptive father victimized his much younger teenage

difference is significant when dealing with a teenager. However, Defendant's advantage in age was compounded in this case since already by age twenty he had acquired a "horrible" criminal history. Therefore, in addition to the age difference, Ms. Durham lacked Defendant's maturity and experience, which included an extensive criminal background.

As exemplified by Defendant's letter, introduced in to evidence at trial, Defendant was aware of Ms. Durham's age and that his relationship to her was wrong, yet he exploited the victim's youth and immaturity for his selfish gain. Defendant also questioned whether Ms. Durham could understand what he was writing to her when he wrote, "Did you understand all of that - I hope so!" (PX 1). There was record evidence to support ten points for OV 10. Defendant's own words to the victim demonstrate that he felt he could manipulate her, persuade her to do his bidding, which included lying about her age to authorities and coaching her in preparation for her court testimony.

Offense Variable 11 - Criminal Sexual Penetration

Defendant argues his score of 25 points for sexual penetrations was improper. The statute at issue reads as follows:

> (1) Offense variable 11 is criminal sexual penetration. Score offense variable 11 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points: (a) Two or more criminal sexual penetrations occurred [50 points]. (b) One criminal sexual penetration occurred [25 points]. (c) No criminal sexual penetrations occurred [0 points]
>
> (2) All of the following apply to scoring offense variable 11: (a) Score all sexual penetrations of the victim by the offense arising out of the sentencing offense. (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13. (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

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victim).

MCL 777.41. In a fairly recent case, this Court found it was not necessary to rule on the proper interpretation of OV 11, finding the lower court's analysis on the variable to be dictum. People v Mutchie, 468 Mich 50, 52; 658 NW2d 154 (2003).

In the case at bar, the defense objected to scoring 25 points for OV 11, questioning whether the probation department utilized "the December act as being a sexual penetration for which they can charge my client 25 points on the November act. . . " and whether this was proper under MCL 777.41(2)(c) (no points for the penetration that forms the basis of the offense). (ST 5). The prosecutor explained there were two counts of criminal sexual conduct, two penetrations testified to by Ms. Durham, and that the court should score the offense variable in "terms of the context of the offenses." (ST 6). Therefore, in terms of sentencing for Count I, an additional penetration existed that was not the basis of that count, thus the score of 25 points was appropriate. (ST 6).

Pursuant to the double jeopardy clause,[4] the prosecution is prohibited from engaging in multiple prosecutions of an individual to prevent undue strain and embarrassment repeat prosecutions could bring. People v Harding, 443 Mich 693; 506 NW2d 482 (1993). Therefore, the prosecutor was required to bring both known counts of criminal sexual penetration perpetrated on this victim in one prosecution against the Defendant. It seems incongruous to then hold that because the charges must be tried together, points for multiple penetrations cannot be scored when a defendant is convicted of more than one count of criminal sexual penetration. Further, this seems at odds with the Legislature's intention to punish every act of criminal sexual penetration. See People v Johnson, 406 Mich 320, 330; 279 NW2d 534 (1979); People v Wilson, 196 Mich App 604, 608; 493 NW2d 471 (1992).

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[4] US Const, 5th Amend.

The trial court was correct in finding the score of 25 points was appropriate in light of the explanation set forth by the appellate court recently in People v McLaughlin, 258 Mich App 635; 672 NW2d 860 (2003), *lv den* 469 Mich 1045; 679 NW2d 70 (2004):

> [T]he proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is a first-degree or third-degree CSC . . . trial courts may assign points . . . for "all sexual penetrations of the victim by the offender arising out of the sentencing offense," while complying with the mandate of 41(2)(c), by not scoring points for the one penetration that forms the basis of a first or third degree CSC offense. Accordingly, trial courts are prohibited from assigning points for the one penetration that forms the basis of a first or third degree CSC offense that constitutes the sentencing offense, but are directed to score points for penetrations that did not form the basis of the sentencing offense.

McLaughlin, *supra* at 676-677.

The Court in *McLaughlin* rejected an argument similar to Defendant's since if one followed this line of argument in cases involving multiple counts, the trial court could not score any points under OV 11 since every penetration was the basis for a charge. McLaughlin, *supra* at 677. Such an analysis is contrary to the statutory guidelines which clearly specify that the trial court is to assign the highest number of points for sexual penetration. MCL 777.41(1). The primary goal of statutory interpretation is to give effect to the Legislature, applying the plain meaning of the words in the statute when they are clearly expressed. People v Morson, 471 Mich 248, 255; 685 NW2d 203 (2004).

Reading this plain language of the statute in conjunction with the statutory provision that the court is not to score the one penetration that "forms the basis of a first- or third-degree criminal sexual conduct offense," MCL 777.41(2)c, in a case such as the instant one, displaying two counts of CSC-3rd based on penetration, the trial court should be permitted to attribute 25 points for one penetration, or else it will render the statute's language nugatory, being unable to score any points, because the case is based on criminal acts involving penetration.

The trial court's score followed the unambiguous language of the statute. The sentencing offense in the instant case involved two counts of criminal sexual penetration of a 15 year old. The Defendant received 25 points for one criminal sexual penetration. Defendant was properly scored under the guidelines, and his request for relief should be denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee prays that this Honorable Court deny Defendant-Appellant's Application for Leave To Appeal and deny his request for relief.

Respectfully submitted,

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DATED: August 5, 2005

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